(33) APR

HIGH COURT OF CHHATTISGARH, BILASPUR

Division Bench: Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ.

Criminal Appeal No. 435 of 2001

Gendu

Versus

State of Chhattisgarh

JUDGMENT

Judgment for consideration

Sd/-
Sunil Kumar Sinha
Judge

Hon'ble Shri Justice L.C. Bhadoo, J

I agree

Sd/-
L.C. Bhadoo
Judge

Post for Judgment: 13 .12.2007

Sd/-
Sunil Kumar Sinha
Judge

(SH) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Division Bench: Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ.

Criminal Appeal No. 435 of 2001

APPELLANT	Gendu, s/o Cheduram, aged around 26 years, Occupation - Labourer, r/o Village Puswada, P.S. Kanker, Tahsil & District Kanker (C.G).
	Versus
RESPONDENT	State of Chhattisgarh, through O.I.C., P.S. Kanker, Tahsil & District Kanker (C.G).

Appearance:

Shri Sandeep Dubey, counsel for the appellant.

Shri Satish Gupta, Dy.Govt. Advocate for the state.

JUDGMENT
(13.12.2007)

Following judgment of the Court was delivered by

Sunil Kumar Sinha, J,

(1) Being aggrieved with the judgment of conviction and order of sentence dated 15th March, 2001 passed by the Additional Sessions Judge, Kanker, in Sessions Trial No.444/1997, the appellant has preferred this appeal. The appellant and two other accused persons namely Digvijay and Sudama were charged with the offences punishable u/ss. 302/34 and 201 I.P.C. The appellant has been convicted u/ss 302 & 201 I.P.C. and sentenced to undergo imprisonment for life and R.I. for two years and to pay a fine of Rs.5000/-, in default thereof, to further undergo 4 months imprisonment with a further direction that the sentences shall be served according to the provisions of section 427(2) of the Code of Criminal Procedure. The other two accused persons have been acquitted.

(2) The brief facts are that in the night of 05.09.2007, the deceased namely Narayan Das Meshram and all the 3 accused persons as also Kailash (P.W.1) went to the house of Girja Bai

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(P.W.3) where they consumed liquor. Some quarrel took place there. Thereafter the deceased and the appellant firstly left the house, the appellant returned back after a short while whereas the deceased did not return back and then other accused persons also left the house of Girja Bai. After that the deceased was not seen in the village and ultimately the deadbody of the deceased was seen by Girja Bai in her well on 07.9.2007 at about 8 a.m. She disclosed this fact to the villagers including Kailash (P.W.1), who reported the matter to the Police, on which, merg intimation (Ex.P.1) was recorded, the body recovery Panchnama was prepared under Ex.P.5. During the investigation, inquest (Ex.P.3) on the body of deceased was prepared. Site plan (Ex.P.4-A) was prepared. The S.H.O. also prepared a site plan under Ex.P.6. One pair of sleepers were seized vide Seizure memo (Ex.P.2). Some pieces of clothes (which the deceased used to sell as a clothe vender), one Bi-cycle and a pair of plastic sleepers were seized under Ex.P.7. One towel was also seized under Ex.P.11. One Torch was seized under Ex.P.12. The body was sent for postmortem examination to District Hospital, Kanker, under Ex.P.16. The postmortem examination was conducted by Dr.M.A. Naseem (P.W.16) who noticed the following injuries/features on the body of the deceased:

(i) the dead body was in the stage of high decomposition. The skin was peeled of on most of the parts. Micro organisms were present on both the eyes, left ear and left side of the neck.

(ii) Tongue was protruded from mouth and was pressed between the teeth;

(iii) There was a contusion, size 2cm x 5cm on right supra clavicular rigor, which was antemortem.

(iv) A clear ligature mark was present on the front side of the neck, which was placed in between thyroid and hyoid cartilage and was extending towards right and left muscles of the neck. Upper skin of the ligature mark has become white. The underlying tissues were compressed with ecchymoses present. This was also antemortem in nature.

(v) The entire body was swollen. Private part and anus were also swollen.

In the internal examination, ecchymoses was present beneath the ligature mark. Both the lungs were congested and putrification has started. Right chamber of the heart was filled with clotted blood. Left chamber was empty. Stomach, small intestine and large intestine were empty. Putrification has also started in lever, spleen and Kidneys. The autopsy surgeon opined that the cause of death was asphyxia due to constriction of ligature around the neck during throttling. It was homicidal in nature. He prepared his report Ex.P.16-A. Based on all this a First Information Report Ex. P-1A was registered.

(3) After completion of the usual investigation, charge sheet was filed in the Court of Addl. Chief Judicial Magistrate, Kanker, who in turn committed the case to the Court of Sessions Judge, Kanker, from where it was received by the Addl. Sessions Judge, who conducted the trial and convicted the appellant as aforementioned while acquitting the other two co-accused namely Digvijay and Sudama.

(4) Admittedly, there is no direct or ocular evidence in this case and the conviction of the appellant is based upon the circumstantial evidence. The learned Addl. Sessions Judge has held that after consuming liquor in the house of Girja Bai (P.W.3), appellant and the deceased had left her house and after a short while, only appellant returned back and the deceased did not return. Therefore, it was established that the deceased was last seen with the accused/appellant and based on theory of last seen together, the appellant was responsible for the murder of the deceased.

(5) Learned counsel for the appellant has not disputed the homicidal death of the deceased. He argued that there is a long gap between two points of time when the deceased was last seen alive with the accused and when he was found dead, therefore, on the basis of last seen together, conviction cannot be sustained.

(6) On the other hand, learned State Counsel opposed these arguments and supported the judgment of conviction and order of sentence passed by the trial Court.

(7) We have heard Shri Sandeep Dubey, learned counsel for the appellant and Shri Satish Gupta, Deputy Govt. Advocate, for the State and have also perused the records of the Sessions Trial.

(8) So far as the nature of the death is concerned, admittedly dead body of the deceased was found in the well of Girja Bai (P.W.3). Girja Bai, her husband Chaman (P.W.2) and many other persons had seen the dead body inside the Well, thereafter Kailash (P.W.1) had reported the matter to the Police , Police came to the village and after preparing Panchnama, the deadbody of the deceased was sent for postmortem examination to the Government Hospital, where the postmortem was conducted by Dr.M.A. Naseem (P.W.16) who has keenly observed the salient features of the deadbody and after the examination, opined that the cause of death was asphyxia due to constriction of ligature around the neck during throttling and the death was homicidal in nature. His said opinion is supported by various features as mentioned above. Therefore, it is established that the death of deceased was homicidal in nature.

(9) In ***Bodh Raj alias Bodha and others –vs- State of Jammu and Kashmir, AIR 2002 SC 3164***, the Apex Court laid down that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established;
2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3) the circumstances should be of a conclusive nature and tendency;
4) they should exclude every possible hypothesis except the one to be proved; and

5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

About the last seen theory, the Apex Court held that the last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of a guilt in those cases.

(10) Almost similar view was again taken by the Apex Court in the matter of ***State of Goa –vs- Sanjay Thakran & anr., (2007 (4) SBR 321***. While passing the said judgment, the Apex Court has also referred to the decision of Bodh Raj case (supra) and finally about the circumstance of last seen together, again it was reiterated that it would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out.

(11) In the present case, the circumstance of last seen together has been held to be established by the evidence of Girja Bai (P.W.3). She has stated that on the fateful night, all the accused persons alongwith Kailash (P.W.1) and deceased had visited her house, and had consumed liquor there. Thereafter, the deceased alongwith accused Gendu left the house. At that time, other accused persons were there in her house. Accused/appellant

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Gendu again returned to her house after a short while, but the deceased did not return with him. She further deposed that thereafter other accused persons also left her house. She saw the dead body of the deceased at about 8 a.m. on Sunday. In the cross examination, she has admitted that the incident of taking liquor was of Friday's night whereas the dead body was found on Sunday's morning. Chaman (P.W.2) who is the husband of Girja Bai (P.W.3) has also deposed in similar fashion. However, P.W.1 Kailash, who was also accompanying the deceased and the accused persons in the house of Girja Bai, has deposed that they all had gone to the house of Girja Bai where they consumed liquor and there some quarrel began on account of paying money. The deceased was having Rs.165/- with him. He gave Rs.15/- to Girja Bai. Thereafter, accused Sudama said for purchasing more liquor, on which, he said that he has no money and then quarrel began. He has deposed that the deceased was having one note of Rs.100/-, one note of Rs.50/- and he said that he will not change these notes. He has most specifically deposed that saying this the deceased, Ram Narayan, left the house of Girja Bai and was followed by all the accused persons. Vide para 4 of his evidence he has deposed that deceased did not return to his house in the night (as he then was staying in his house on the fateful night) and a search was made in the morning. But ultimately on the next day i.e. Sunday, his dead body was seen in the Well of Girja Bai which is situated in the Courtyard of the house of Girja Bai. On the basis of this evidence, the Court below has held that since the deceased and the appellant had left the house of Girja Bai after consuming the liquor and only the appellant returned after some time and the deceased did not return with him, therefore, on the basis of last seen together the appellant would be responsible for the death of deceased.

(12) Firstly, in light of the evidence of P.W.1 Kailash, the version given by P.W.3 Girja Bai and her husband Chaman (P.W.2), does not appear to be correct. According to Girja Bai and Chaman, the deceased and the appellant (only two persons) left their house whereas according to the evidence of Kailash (P.W.1) the deceased

all alone left the house of Girja Bai and all the accused persons followed the deceased thereafter. Therefore, the theory of lastly seeing the deceased in the company of the appellant alone is not established by the prosecution beyond reasonable doubt and the evidence of P.W.2 Chaman and P.W.3 Girja Bai is shaky on this point.

(13) Apart from the above, according to the prosecution, the deceased was seen in the company of the appellant in the night of 05.9.1997 whereas the dead body of the deceased was found on 07.9.1997 at about 8 a.m., therefore, there is a long time gap in between the two and in these circumstances, a possibility of any other person being with the deceased could not be completely ruled out. Therefore, we are of the considered view that the conviction of the appellant based on the circumstance of last seen together cannot be sustained and the appellant is entitled to get benefit of doubt.

(14) In the result, the appeal is allowed. The conviction and sentence awarded to the appellant are set aside. He is acquitted of the charges framed against him.

(15) It is stated that the appellant is in jail since the date of conviction. He be released forthwith if not required in any other case.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge

Rao